FILE COPY

Nos. 79 - 84

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1340

THE UNITED STATES OF AMERICA,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*

No. 1340

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*,

vs. *Appellants,*

THE UNITED STATES OF AMERICA.

No. 1360

PARAMOUNT PICTURES, INC., and PARAMOUNT FILM DISTRIBUTING CORPORATION,

vs. *Appellants,*

THE UNITED STATES OF AMERICA.

No. 1361

COLUMBIA PICTURES CORPORATION and COLUMBIA PICTURES OF LOUISIANA,

vs. *Appellants,*

THE UNITED STATES OF AMERICA.

No. 1362

UNITED ARTISTS CORPORATION,

vs. *Appellant,*

THE UNITED STATES OF AMERICA.

No. 1363

UNIVERSAL PICTURES COMPANY, INC. (sued herein as Universal Corporation and Universal Pictures Company, Inc.), UNIVERSAL FILM EXCHANGES INC. and BIG U FILM EXCHANGE, INC.,

vs. *Appellants,*

THE UNITED STATES OF AMERICA.

MEMORANDUM OF THE TWENTIETH CENTURY-FOX, LOEW, RKO, PARAMOUNT AND WARNER DEFENDANTS IN OPPOSITION TO THE MOTIONS FOR LEAVE TO INTERVENE FILED BY AMERICAN THEATRES ASSOCIATION, INC., *ET AL.*, AND W. C. ALLRED, *ET AL.*

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Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, *Appellant*, *vs.* PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*	No. 1348
LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1349
PARAMOUNT PICTURES, INC., and PARAMOUNT FILM DISTRIBUTING CORPORATION, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1350
COLUMBIA PICTURES CORPORATION and COLUMBIA PICTURES OF LOUISIANA, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1351
UNITED ARTISTS CORPORATION, *Appellant*, *vs.* THE UNITED STATES OF AMERICA.	No. 1352
UNIVERSAL PICTURES COMPANY, INC. (sued herein as Universal Corporation and Universal Pictures Company, Inc.), UNIVERSAL FILM EXCHANGES INC. and BIG U FILM EXCHANGE, INC., *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1353

MEMORANDUM OF THE TWENTIETH CENTURY-FOX, LOEW, RKO, PARAMOUNT AND WARNER DEFENDANTS IN OPPOSITION TO THE MOTIONS FOR LEAVE TO INTERVENE FILED BY AMERICAN THEATRES ASSOCIATION, INC., *ET AL.*, AND W. C. ALLRED, *ET AL.*

The Twentieth Century-Fox, Loew, RKO, Paramount and Warner defendants respectfully submit this memorandum in opposition to the motions filed in this Court by the petitioners, American Theatres Association, Inc., et al. and W. C. Allred, et al., jointly and severally, for leave to intervene as parties in the above entitled appeals on behalf of themselves and others allegedly similarly situated.

The petitioners pray that they may be permitted to appear in these proceedings and be heard as intervenors, claiming the right to do so by virtue of Rule 24(a) of the Rules of Civil Procedure, and the decision of this Court in *United States* v. *Terminal Railroad Association of St. Louis*, 236 U. S. 194. The purpose of the intervention as stated in their motions is in order to enable the petitioners to urge that the plan for competitive bidding embodied in subparagraphs (a), (b), (c) and (d) of Paragraph 8 of Section II of the decree of the United States District Court for the Southern District of New York, dated December 31, 1946, is erroneous, and that the decree should be accordingly reversed and the causes remanded for elimination of these paragraphs.

Point I.

PETITIONERS ARE NOT ENTITLED TO INTERVENE AS OF RIGHT

The Rules of Civil Procedure, including Rule 24(a) upon which the petitioners specifically rely, were adopted by the Supreme Court pursuant to authority granted it by the Act of June 19, 1934, Chapter 651 (28 U. S. C. § 723b), which act gave this Court the power to prescribe rules for the District Courts of the United States and the courts of the District of Columbia.

Rule 1 of the Rules of Civil Procedure specifically states that the rules are to govern procedure in the District Courts of the United States, and Rule 81 sets forth the proceedings in which the rules are to be applicable. It is clear, therefore, that the rules apply only to the District Courts and not to the Supreme Court (see *Mookini* v. *United States*, 303 U. S. 201, construing the applicability of the Criminal Appeals Rules).

Petitioners therefore cannot urge that Rule 24(a) entitles them to intervene by original motion in the Supreme Court as of right, even if it be assumed that their situation brings them within the terms of such rule, i.e., that they are inadequately represented and that they will be bound by the judgment. However, the opinion in *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, makes it clear that they are not to be treated as being inadequately represented, and that they are not bound by the decree in the manner contemplated by the Rule.

Point II.

PETITIONERS SHOULD NOT BE PERMITTED TO INTERVENE AS A MATTER OF DISCRETION

Reliance is placed by the petitioners upon the decision of this Court in *United States* v. *Terminal Railroad Association of St. Louis*, 236 U. S. 194, and particularly the language of the Court at page 199 where it was stated that, "* * * although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights".

It is submitted, however, that this case is not applicable. In the first place, the case involved a public utility which

the lower court had enjoined from carrying on a public transportation business. The case was before this Court upon application of the defendants for modification of the decree in order to make it clear that it was not intended to prohibit transportation incidental to the business which the Terminal Association was allowed to continue. The petitioners similarly urged modification. Had the defendant Terminal Association, a public service organization, sought voluntarily to terminate the service which it was rendering, the petitioning intervenors would have had a right to go to court to prevent that action. In the case at bar, however, had one or more of the defendants individually determined to distribute their motion pictures on a competitive bidding basis such as that provided for in the decree, and which the petitioners seek leave to attack, none of the petitioners would have possessed a similar legal right to require the defendants to license motion pictures to them in any other way or at all. This distinction is fundamental.

Furthermore, in the *Terminal* case the petitioners were not seeking reversal of the decree, but only to have it modified so as to make it clear that it was not intended to affect their rights. As this Court has clearly pointed out in *United States* v. *California Cooperative Canneries*, 279 U. S. 553 at page 556, it has long been the settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree. See *In Re Veach*, 4 F. 2d 334; *Union Trust Co.* v. *Jones*, 16 F. 2d 236, and the numerous other cases cited by Mr. Justice Brandeis in the *California Canneries* case in a footnote at pages 556 to 557, cases arising under former Equity Rule 37 and cases arising prior to that rule.

Here petitioners seek to impeach the decree, and frankly state that their purpose in seeking to intervene is to persuade this Court that certain of its provisions, i.e., those having

to do with competitive bidding, are erroneous and should be reversed and the cases remanded to the District Court with directions to eliminate the portions of the decree having to do with competitive bidding.

Even if it be assumed that Rule 24(a) of the Rules of Civil Procedure is applicable, or that it states a rule of law as to when intervention may be had as a matter of right, the petitioners do not qualify. It was made amply clear in *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, that their contentions must be rejected. There it was shown that Section 16 of the Clayton Act (15 U. S. C., par. 26) conferred no right to intervene, and that the petitioners would not be bound by the judgment in the sense in which the term is used in Rule 24(a). In the *Cash Register* case this Court distinguished *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U. S. 502, upon which petitioners also rely, upon the express ground that there the petitioner for intervention was named in the decree as one who should be heard in the event certain action was taken affecting its property rights. The Court pointed out that intervention in an appellate court was unusual, saying at page 506 "Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation, is, barring very special circumstances, a matter for the *nisi prius* court." (See also *Morini* v. *City of Stuart* (C. C. A. 5th) 112 F. 2nd 585.) And the Court stressed the fact, (p. 508), that there the petitioners were seeking to enforce and vindicate the decree, not to impeach it, as in the case at bar.

Furthermore, it has been held that an individual may not intervene in a suit brought under the Antitrust Laws by the Attorney General where the latter does not consent to such intervention. *U. S.* v. *Columbia Gas & Electric*

Corporation, 27 F. Supp. (D. C. Del.), appeal dismissed, 108 F. 2d 614, and cert. den. 319 U. S. 687. The Attorney General opposed intervention below, and, so far as we are presently advised, has not altered this position.

The case of *U. S.* v. *Radio Corporation of America, et al.*, 3 F. Supp. 23 (D. C. Del.), indicates the proper procedure in case petitioners feel aggrieved by the decree, i.e., to file a bill in the court which entered the decree seeking appropriate relief.

None of the undersigned would oppose applications by the petitioners for leave to file briefs *amicus curiae* provided the Court feels they would be of assistance and they accurately state the facts.

WHEREFORE the undersigned respectfully request that the motions of American Theatres Association, Inc., et al. and W. C. Allred, et al. for leave to intervene in the Supreme Court be denied.

Respectfully submitted,

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Attorney for Loew's Inc.

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Attorney for Twentieth Century-Fox Film Corporation, et al.

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Attorneys for Radio-Keith-Orpheum Corporation, et al.

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